Office - Supreme Court, U.S.
FILED
SEP 4 1956
JOHN T. FEY, Clerk

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER 1956 TERM

No. 376

JOHN P. KINSEY, LAWRENCE G. KUNKEL and THE WATERBURY CORRUGATED CONTAINER COMPANY,

Petitioners,

v.

BURTON S. KNAPP, CHARLES E. RANEY, GEORGE A. BLUM, DON B. LEATHERS and ARTHUR W. SEMPLINER, individually and as Directors and Stockholders of MONROE PAPER PRODUCTS COMPANY, and as Trustees under Voting Trust Agreement dated as of December 31, 1953, pertaining to stock therein; GEORGE J. HUBER, individually and as Chairman of Stockholders' Committee of MONROE PAPER PRODUCTS COMPANY stock,

Respondents.

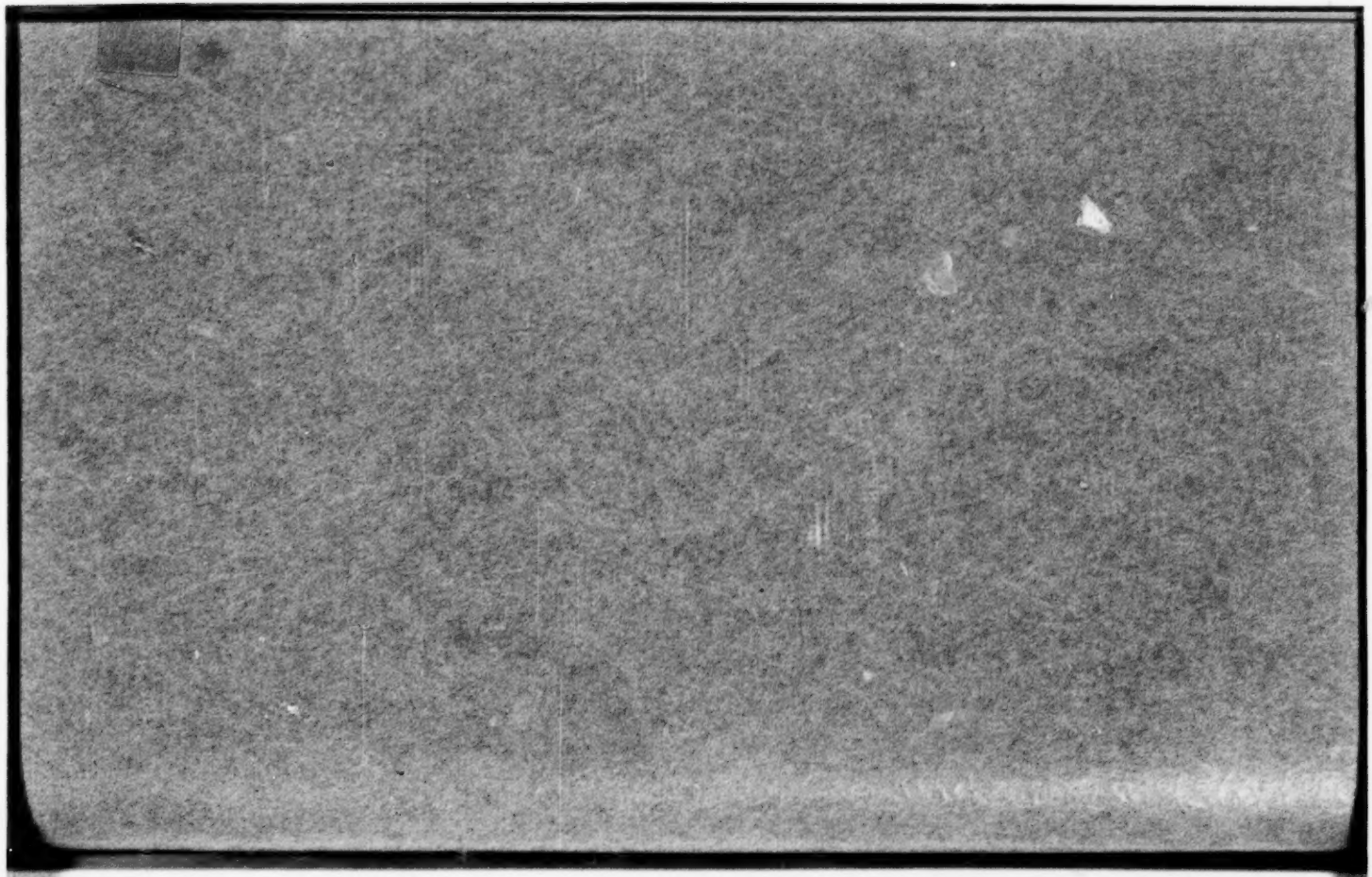
PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

GEORGE E. BRAND,
Attorney for Petitioner,

GEORGE E. BRAND Jr.,
Of Counsel,

3709-23 Cadillac Tower,
Detroit 26, Michigan.

MORRIS, INC., 908 HENRY ST., DETROIT, MICH.



INDEX

	Page
PETITION FOR WRIT OF CERTIORARI	1-11
Opinions—Below	1-2
Statement as to Jurisdiction	2
Questions Presented for Review	2-3
Statement of the Case	3-6
Argument	6-10
APPENDIX	12-17
Court of Appeals	
Judgment—filed May 1, 1956	12
Order Denying Rehearing—filed May 11, 1956	13
Mandate for Retrial and Imposing Costs—issued August 23, 1956	14-15
Order Staying Execution as to Costs—filed August 22, 1956	16-17

Index of Citations

Cases

Cornelius v. C.C. Pictures Inc. (CCA 2), 7 F 2d 308	8
Crowe v. DiManno (CA 1), 225 F 2d 652, 659	8
Denicke v. Anglo California Nat. Bank of San Francisco (DC N. D. Cal.), 45 Supp. 524	10
Goodwin v. Castleton, 19 Wash. (2d) 748 144 P. (2d) 725, 150 ALR 859	10
Hunt v. Howes (CCA 5), 74 Fed 657, 659	8
Hurd v. Letts (CA D. C.), 152 F 2d 121	8

	Page
Matthew v. Coffin (CCA 9), 32 F 2d 100, 102	8
Michigan Central R. Co., In re (CCA 6), 124 Fed 727	6
Morris v. U.S. (CCA 8), 26 F 2d 444	8
Newcomb v. Burbank (CCA 2), 181 Fed 334	8
Newton v. Consolidated Gas Company of New York, 265 U S 78, 68 L ed 909	6
Peper v. Fordyce, 119 U S 469, 30 L ed 435	8
Talbert v. Muskegon Construction Co., 305 Mich. 345	7
Tug River Coal & Salt Co. v. Brigel (CCA 6), 67 Fed 625	8
United States Securities and Exchange Commission and William H. Timbers, Appeal of (CA 6), 226 F 2d 501 (Footnote)	9

Statutes

28 USC § 144	8, 9
28 USC § 1254(1)	2

Court Rules

Rule 23(c), Rules of Civil Procedure	10
Rule 23(3) of the Court of Appeals	5

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER 1956 TERM

No.

JOHN P. KINSEY, LAWRENCE G. KUNKEL and THE WATERBURY CORRUGATED CONTAINER COMPANY,

Petitioners,

v.

BURTON S. KNAPP, CHARLES E. RANEY, GEORGE A. BLUM, DON B. LEATHERS and ARTHUR W. SEMPLINER, individually and as Directors and Stockholders of MONROE PAPER PRODUCTS COMPANY, and as Trustees under Voting Trust Agreement dated as of December 31, 1953, pertaining to stock therein; GEORGE J. HUBER, individually and as Chairman of Stockholders' Committee of MONROE PAPER PRODUCTS COMPANY stock,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Opinions—Below

Knapp et al v. Kinsey et al (CA 6, May 1, 1956), 232 F 2d 458. Nine copies are filed with this petition.

Knapp et al v. Kinsey et al (CA 6, July 19, 1956) as to Rehearing or Supplemental Order as to Costs (Not yet reported; nine copies are filed with this petition).

Kinsey et al v. Knapp et al (D.C.E.D. Mich., August 4, 1955). Not reported. See appeal appendix pages 167a-322a.*

Statement as to Jurisdiction

Date of the judgment sought to be reviewed and date of entry—May 1, 1956 and date of order denying rehearing as to costs and date of entry—July 19, 1956.

Statute believed to confer jurisdiction to review by certiorari—28 USC § 1254(1).

Questions Presented for Review

1. Having ordered a new trial of a derivative action solely on the ground that bias and prejudice on the part of the trial judge rendered the resulting judgment nugatory, did the Court of Appeals have the power or discretion to require petitioners (the appellees) to repay respondents' (appellants') costs on the appeal?

2. In any event was not the allowance to respondents of $9,356.76 cost of printing their appendix and $1,875 premium on supersedeas bond, inequitable and improper,

*Page references, in this petition, followed by "a" are to respondents' (appellants') printed appendix in the Court of Appeals, and those followed by "b" are to petitioners' (appellees') printed appendix in that court. Nine copies of both appendices and of the proceedings in the two Court of Appeals opinions referred to, supra, are filed pursuant to Rule 23 of this Court.

especially in view of the facts that (a) respondents failed during the trial to seek to disqualify the trial judge or to move for mistrial because of claimed bias or prejudice, (b) the judgment against respondents was for breach of their fiduciary duty to the defendant Company and was not subject to waiver or abandonment by the plaintiff stockholders without the approval of the Court, and (c) the bond and at least 4108 out of 4458 pages of the respondents' appendix (see Petition for Rehearing, page 3) pertained to the merits of the action and as to which neither party prevailed in the Court of Appeals?

Statement of the Case

On February 2, 1954 petitioners, seeking derivative relief as stockholders of Monroe Paper Products Company and also individual relief, instituted an action in the District Court against five of the respondents as a majority of the directors of the Company and as trustees under a five year voting trust agreement dated December 31, 1953 pertaining to stock in the Company. Respondent Huber and the Company were joined as defendants. The complaint, as amended and supplemented after discovery examinations (16a-51a, 111a-116a), charged, *inter alia*, misuse of company funds and facilities, wrongful diversion of corporate opportunties and that the voting trust agreement was in violation of the defendant directors' fiduciary duties and state and federal laws, including those pertaining to restraint of trade and to the issuance and sale of securities. Accounting, declaratory, injunctive, and other, relief was sought. Jurisdiction of the District Court was based upon diversity of citizenship and jurisdictional amount and federal questions. Trial commenced on October 12, 1954 and was completed on June 2, 1955 (8a-

14a). On August 4, 1955 the trial judge filed detailed findings of fact and conclusions of law, consisting of 170 typewritten pages[1] expressly finding that the voting trust was violative of the fiduciary duties owing to the Company and its stockholders by the respondents (310a-312a, also 249a). Partial final judgment was thereupon entered holding the individual defendants accountable *to the Company* for upwards of $300,000 and dissolving the voting trust agreement (318a-322a). Trial of the claims of the plaintiffs for individual relief was deferred (432b-435b). On August 5, 1955 the respondents appealed, giving bond to stay execution (14a-15a).

Respondents took no steps to disqualify the trial judge either at the start of or at any time during the trial or to claim a mistrial. Instead, at the conclusion of the plaintiffs' case they sought dismissal of the plaintiffs' claims on the merits and throughout affirmatively requested that the trial judge make findings in their favor on the merits (1203a-1205a; 118a-166a). They did not seek a rehearing on any ground. On the appeal they did not seek reversal or new trial on the grounds of disqualification of the trial judge or of mistrial, but affirmatively sought judgment in their favor on the merits. In their brief they stated and raised only the following questions:

> Are the findings of the trial judge entitled to any weight?
>
> Is there any evidence of corporate mismanagement or misappropriation of funds?
>
> Is there any evidence of a conspiracy?
>
> Is the voting trust valid?

[1]Included in appeal appendix pages 167a-324a.

and prayed only—

> "that the findings be vacated * * * and that the judgment be reversed with costs *and the case dismissed.*"

The first assertion of any claim of bias and prejudice was made in respondents' brief on appeal served in October 1955, after their appendix had largely been printed and the printing of appellees' appendix was well under way.

The appeal was argued on December 12, 1955 and was decided May 1, 1956 (232 F 2d 458; nine copies filed herewith). Copy of the judgment of the Court of Appeals, entered May 1, 1956 is attached (page 11, post). The Court did not pass upon any of the questions pertaining to the merits but remanded the case for new trial before another judge because the trial judge "failed from the start of the trial to view this case with the impartiality between litigants that the defendants were entitled to receive," expressly stating that petitioners' counsel "did not ask or need such assistance." The decision was silent as to allowance of costs, but Rule 23(3) of the Court of Appeals provides that in case of reversal of any judgment, costs shall be allowed to the appellant, unless otherwise ordered by the Court.

On May 11, 1956 petitioners filed their petition for rehearing or supplemental order as to costs, seeking disallowance of costs or reapportionment. This petition is part of the record below and nine copies are filed herewith. On July 19, 1956 the Court of Appeals, by written decision, ante, denied the petition for rehearing. Copy of the denial order entered July 19, 1956, is attached (page 12, post). Mandate for retrial and allowing respondents their costs on appeal was issued on August 23, 1956, supplemented

by order filed August 22, 1956, staying execution for said costs pending this application for certiorari. Copies of the mandate and stay order are attached (pages 14-17, post).

Petitioners seek certiorari to review the action of the Court of Appeals in allowing such costs and, in any event, in refusing to apportion them.

Argument

The question presented is basic and fundamental in the administration of justice—not an ordinary or mere matter of the award, apportionment or withholding of costs as between litigants, but an overlying and vital element of the government's responsibility for the judicial process.

Decisions, *on appeal*, denying relief from discretional allowances of costs by a district judge are not applicable. However, where the power to award costs is in question review even on an appeal has been granted. *Newton v. Consolidated Gas Company of New York*, 265 U S 78, 68 L ed 909, approving *In re Michigan Central R. Co.* (CCA 6), 124 Fed 727.

Whether tested from the point of lack of power or discretion or improper exercise thereof, the question merits review under the supervisory powers of this Court. As the end-result of months and months of taking of testimony in the trial on the merits, joint approval of extensive findings of fact, extended arguments and a judgment in the Company's favor for derivative relief, a mistrial was declared solely because of bias and prejudice of the trial judge, whereupon one group of the unfortunately affected litigants which has already paid its appeal expense of $7,700, is ordered also to pay the $11,000 of costs of the

other group despite the fact that it was without fault of either group that no judicial determination has been obtained upon the claims sought to be adjudicated. Petitioners contend that the imposition of costs upon them is, under the circumstances, unjust and a denial of due process of law.

The responsibility for the selection and conduct of a trial judge is that of government. The right of every litigant to a trial presided over by a qualified judge is a *sine qua non* of due process of law. A mistrial is equivalent to no trial.

Petitioners contend that the Court of Appeals had no right or power to impose upon petitioners responsibility for respondents' costs. Fault was not that of petitioners.

Talbert v. Muskegon Construction Co., 305 Mich. 345:

> "One of the fundamental rights of a litigant under our judicial system is that he shall be entitled to a hearing before a court to which no taint of prejudice is attached. This is so firmly established as to regularly constituted courts as to need no comment. * * *
>
> "We are constrained to hold that the hearing and award must be vacated and the case remanded for a full rehearing either before the department or before a qualified deputy commissioner. *Since we do not find that either party was solely responsible for the irregular proceedings taken, no costs are awarded.*" (Italics added)

Petitioners contend that the decision of the Court of Appeals so far departs from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's supervisory function, and that the decision also conflicts with that of other courts including the United States Court of Appeals for the First Circuit.

Crowe v. DiManno (CA 1), 225 F 2d 652, 659. Appellants sought and obtained a new trial before another judge because of misconduct of the trial judge. Notwithstanding, the court held:

> "* * * But we are not vacating the judgment below for any misconduct of counsel for the plaintiff. We are vacating it for repeated acts of misconduct by the trial judge and in this situation we do not *think the plaintiff-appellee should be charged with costs in this court.*" (Italics added)

Even where reversal is compelled because of lack of jurisdiction, costs are not imposed against the appellee if appellant did not raise the question in the District Court. *Matthew v. Coppin* (CCA 9), 32 F 2d 100, 102; *Hunt v. Howes* (CCA 5), 74 Fed 657, 659; *Newcomb v. Burbank* (CCA 2), 181 Fed 334; *Cornelius v. C.C. Pictures, Inc.* (CCA 2), 7 F 2d 308.

Tug River Coal & Salt Co. v. Brigel (CCA 6), 67 Fed 625. Where the question of jurisdiction was not raised in the lower court, equal division of costs on appeal was ordered, undoubtedly on the theory that both parties were at fault. See *Peper v. Fordyce*, 119 U S 469, 30 L ed 435.

Petitioners also contend that the Court of Appeals herein erred in holding that 28 USC § 144 requiring that affidavits of prejudice be filed not less than 10 days before the beginning of the term "or good cause be shown for failure" is not applicable when the claimed bias or prejudice was first disclosed during the trial. The contrary has been ruled in other Circuits, consistently with the Code.

In *Morris v. U.S.* (CCA 8), 26 F 2d 444, the affidavit of prejudice was filed on the day of trial. In *Hurd v. Letts* (CA D. C.), 152 F 2d 121, the affidavit was filed 5 days

after trial commenced and the filing was held proper to preserve the question for review on appeal and prohibtion was denied.

Petitioners contend that the code expressly contemplates belated filing under the instant circumstances. The opinion of the Court of Appeals herein discloses that the bias and prejudice which destroyed the effectiveness of the trial was manifested from the outset and many months before the judgment and that the conduct resulted in the reversal of the contempt order against Mr. Timbers[2] was long before the trial of the derivative action was completed. In fact the trial was delayed to permit the hearing of the contempt appeal. The record herein is clear that respondents, even in the Court of Appeals, unsuccessfully sought only to obtain a decision in their favor on the merits without urging that a mistrial had occurred. Under such circumstances the imposition upon petitioners of the printing costs incurred by respondents in presenting their contentions that the complaint should be dismissed on the merits is unjust.

It is patent that the imposition of costs was due to the Court's misinterpretation of 28 USC § 144, for the Court (Opinion page 2) unequivocally held that:

> "In our opinion, Section 144, Title 28, U.S. Code was not applicable to this case in which the claimed bias or prejudice was first disclosed during the trial."

No other appellate court has so restricted the operation of the code provision. Petitioners contend that by such basic misconstruction the Court reached the erroneous

[2]Appeal of the United States Securities and Exchange Commission and William H. Timbers (CA 6), 226 F 2d 501.

conclusion that right and equity as to costs was with respondents under the circumstances.

The partial relief granted by the trial judge was solely for wrongs perpetrated *upon the Company* by the respondent directors. In respect thereto the petitioners, as plaintiffs, were trustees for the Company's benefit. *Denicke v. Anglo California Nat. Bank of San Francisco* (DC N. D. Cal.), 45 F Supp 524; *Goodwin v. Castleton*, 19 Wash. (2d) 748, 144 P. (2d) 725; 150 ALR 859. Rule 23(c), Rules of Civil Procedure, recognizes this by its provision that:

> "(c). A class action shall not be dismissed or compromised without the approval of the court."

Petitioners had no right to waive the judgment or its enforcement. The Company was the real litigant as to the matters determined in the District Court and petitioners contend that the imposition on them of the appeal costs was unwarranted.

Wherefore, petitioners pray that a writ of certiorari issue under the seal of this Court, directed to the United States Court of Appeals for the Sixth Circuit, commanding said court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Court of Appeals had in the case numbered and entitled on its docket, No. 12,676, *Knapp et al, Appellants v. Kinsey et al, Appellee*, to the end that said cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment herein of said Court of Appeals be reversed

by this Court, and for such further relief as to this Court may seem proper.

Dated August 29, 1956.

John P. Kinsey,
Lawrence G. Kunkel,
The Waterbury Corrugated
Container Co.,
Petitioners,

By George E. Brand,
Their Attorney.

GEORGE E. BRAND,
Attorney for Petitioners,

GEORGE E. BRAND, Jr.,
Of Counsel,

3709-23 Cadillac Tower,
Detroit 26, Michigan.

APPENDIX

UNITED STATES COURT OF APPEALS

For the Sixth Circuit

No. 12,676

BURTON S. KNAPP, ET AL.,
Appellants,

vs.

JOHN P. KINSEY, ET AL.,
Appellees.

JUDGMENT

Before SIMONS, Chief Judge; ALLEN and MILLER, Circuit Judges.

APPEAL from the District Court of the United States for the Eastern District of Michigan.

THIS CAUSE came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Michigan, and was argued by counsel.

ON CONSIDERTION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed and the case remanded to the District Court for a retrial before another judge.

Approved for entry:

/s/ Shackelford Miller, Jr.
United States Circuit Judge

FILED
May 1, 1956
Carl W. Reuss, Clerk

No. 12,676

ORDER DENYING REHEARING

(Filed July 19, 1956)

Before SIMONS, Chief Judge; ALLEN and MILLER, Circuit Judges.

Appellees' Petition for Rehearing or Supplemental Order as to Costs is denied.

Approved for entry:

/s/ Shackelford Miller, Jr.
U. S. Circuit Judge

MANDATE

(Issued August 23, 1956)

THE PRESIDENT OF THE UNITED STATES OF AMERICA

To the Honorable, the Judges of the United States District Court for the Eastern District of Michigan—GREETING:

WHEREAS, lately in the United States District Court for the Eastern District of Michigan, before you or some of you, in a cause between *John P. Kinsey, Ind., et al., Plaintiffs, and Burton S. Knapp, et al Defendants,* (D. C. No. 13,179 Civil), a judgment was entered on the 4th day of August, 1955; and on August 9, 1955, an order was entered correcting errors in judgment under Rule 60(a);

AND WHEREAS, the said Defendants appealed to this court as by the inspection of the transcript of the record of the said District Court, which was brought into the United States Court of Appeals for the Sixth Circuit by virtue of an appeal agreeably to the Act of Congress, in such cases made and provided, fully and at large appears.

AND WHEREAS, in the present term of October, in the year of our Lord, one thousand nine hundred and fifty-five, the said cause came on to be heard before the said United States Court of Appeals for the Sixth Circuit, on the said transcript of record, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is

hereby reversed and the case remanded to the District Court for a retrial before another judge.

A further order was entered on the 22nd day of August, 1956, a copy of which is attached:

YOU, THEREFORE, ARE HEREBY COMMANDED that such proceedings be had in said cause, in conformity with the opinion and judgment of this court, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

WITNESS the Honorable EARL WARREN, Chief Justice of the United States, the twenty-third day of August in the year of our Lord one thousand nine hundred and fifty-six.

Carl W. Reuss,
Clerk, United States Court of
Appeals for the Sixth Circuit.

By. Noyce S. Robertson,
Chief Deputy.

COSTS—(To be recovered by appellants)	
Clerk	$ 25.00
Printing record as appendix to brief and premium bond	$11,231.70
Total	$11,256.70

(Seal)

No. 12,676

ORDER STAYING EXECUTION AS TO COSTS

(Filed August 22, 1956)

Before SIMONS, Chief Judge; ALLEN and MILLER,, Circuit Judges.

Appellees' motion for a stay of execution having been considered by the Court;

IT IS ORDERED as follows:

1. That the mandate of this Court go down to the District Court forthwith, and that a copy of this order be attached to the mandate.

2. Execution for the collection of the costs taxed in this court in favor of appellants is hereby stayed pending the outcome of an application intended by appellees to be made to the Supreme Court for a writ of certiorari upon condition (a) that within five days after this date appellees file with the Clerk of this Court a stay bond in the penal sum of $12,000.00, conditioned as provided in paragraph 3 of this order, *and* (b) that on or before September 12, 1956 appellees file their petition for certiorari with the Clerk of the Supreme Court; and in default of such filing of said bond or petition the stay of execution shall terminate.

3. Said bond shall be approved by counsel as to form and security or shall be settled by the Clerk on notice and shall be conditioned that appellees shall answer for all damages and costs which appellants may sustain by reason of this stay, and that appellees shall pay appellants the

full sum of $11,256.70 with interest thereon from this date if said application for certiorari shall be denied by the Supreme Court, or if such application be granted appellees will abide and perform the final determination of the Supreme Court thereon.

Approved for entry:

/s/ Shackelford Miller, Jr.,
U. S. Circuit Judge.

37/37

FILED
SEP 27 1956
JOHN T. FEY, Clerk

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER 1956 TERM

No. 376

JOHN P. KINSEY et al,
Petitioners,
v.
BURTON S. KNAPP et al.
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

RICHARD FORD,
Attorney for Respondents
Knapp et al, Voting Trustees,
1100 Dime Building,
Detroit 26, Michigan.

ARTHUR W. SEMPLINER,
Attorney for Respondents
Knapp et al, Individually,
2005 Dime Building,
Detroit 26, Michigan.

CHARLES H. KING,
Attorney for Respondent Huber,
130 East Elizabeth,
Detroit 1, Michigan.

KENNETH B. McCONNELL,
FISCHER, SPRAGUE, FRANKLIN & FORD,
Of Counsel,
1100 Dime Building,
Detroit 26, Michigan.

MOERS, INC., 905 HENRY ST., DETROIT, MICH.

INDEX

	Page
Brief in Opposition to Petition for Certiorari	1-8
Opinions Below	1
Counter-Statement of Questions Presented	2
Court Rule Involved	2
Counter-Statement of the Case	2-4
Argument	2-8

Index of Citations

Appeal of United States Securities and Exchange Commission (C.A. 6, Oct. 19, 1955) 226 F2d 501	1, 2, 3, 6
DuBois v. Kirk, 158 U.S. 58, 39 L. Ed. 895	4
Edwards v. Bay State Gas Co. (D. Del., 1904) 130 Fed 242	6
Eisler v. United States (C.A. D.C. 1948) 170 F2d 273	5
Ex Parte American Steel Barrel Co., 230 U.S. 35, 57 L. Ed. 1379	5
Glendale Electric Fabrics Co. v. Smith, 100 U.S. 110, 25 L. Ed. 547	4
Holland v. Presley (1939) 14 N.Y.S. 2d 83	6
Hurd v. Letts (C.A. D.C. 1945) 152 F2d 121	5
Kennedy v. Emerald Coal & Coke Co. (1943) 21 Del. Ch. 55, 30 A2d 269	6
Knapp v. Kinsey (C.A. 6, May 1, 1956) 232 F2d 458	1, 3
Knapp v. Kinsey (C.A. 6, July 19, 1956) F2d	1, 5, 8

Page

Minnesota and Ontario Paper Co. v. Molyneaux (C.A. 8, 1934) 70 F2d 545 6
Moskun v. United States (C.A. 6 1944) 143 F2d 129 3
Newton v. Consolidated Gas Co., 265 U.S. 78, 68 L. Ed. 909 4
Paper Bag Machine Cases, 105 U.S. 766, 26 L. Ed. 959 4
Reflor v. Lansing Drop Forge Co. (C.A. 6, 1942) 124 F2d 440 6
Shea v. United States (CCA 6, 1918) 251 Fed. 433 6
United States v. Flegenheimer (D. C. N.J. 1935) 14 F. Supp. 584 5

Court Rule

Rule 23(3) of Court of Appeals (6th Circuit) 2,3

Page

6
5

4

4

6
6

5

2,3

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER 1956 TERM

No. 376

JOHN P. KINSEY et al,
Petitioners,

v.

BURTON S. KNAPP et al.
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Opinions Below

Appeal of United States Securities and Exchange Commission (C. A. 6, Oct. 19, 1955), 226 F 2d 501 re evidence and contempt of court; nine printed copies filed herewith.

Knapp v. Kinsey (C. A. 6, May 1, 1956), 232 F 2d 458—the appeal in chief; printed copies filed by petitioners.

Knapp v. Kinsey (C. A. 6, July 19, 1956, ... F 2d .....—on motion for rehearing. Not yet officially reported; printed copies filed by petitioners.

Counter-Statement of Questions Presented

The Court of Appeals has awarded the usual costs to the prevailing party. The question is whether, for some reason peculiar to this case, this was such an abuse of discretion as to justify review in this Court. No one doubts that the Court of Appeals had the power to award costs as it did, or that it had the power to disallow costs if its discretion had so inclined it.

Court Rule Involved

Rule 23(3) of the Court of Appeals for the Sixth Circuit provides:

> "(3) In cases of reversal of any judgment or decree in this court, costs shall be allowed to the appellant, unless otherwise ordered by the Court."

Counter-Statement of the Case

Plaintiffs below, petitioners here, sought to acquire control of Monroe Paper Products Company. Opposing stockholders organized a voting trust. When about 52% of all the stock was deposited in the voting trust, plaintiffs began this suit against the voting trustees and others to have the voting trust declared to be unlawful upon various theories. This was a supposed cause of action personal to the plaintiffs. They joined with it a supposed derivative cause of action charging the defendants with mismanagement, misappropriation of corporate funds, and poor business judgment (16a-51a). Plaintiff Kinsey admitted that the so-called derivative claim was incidental to the attempt to break up the voting trust (896a). The Securities and Exchange Commission described the suit as

> "a phase of a struggle for control of the Monroe Paper Products Company * * * between Monroe

> local management and the Waterbury Corrugated Container Corporation, a Connecticut corporation in the same line of business." (Commission's Brief, pp. 1-2, on its appeal, 226 F 2d 501)

Throughout an eight-month trial there was a long series of unusual maneuvers by the plaintiffs, extraordinary rulings and actions by the District Judge, and of unavailing protests and exceptions by defendants. See the detailed narrative in the Court of Appeal's opinion on the preliminary appeal taken by the Securities and Exchange Commission from the sixty-day jail sentence imposed on its general counsel, 226 F2d 501, and the further narrative in the opinion on the main appeal, 232 F2d 458. Eventually the District Court on August 4, 1955, entered a judgment dissolving the voting trust and finding defendants liable for $306,982.62 (323a-324a).

Defendants were advised that such judgment appeared to be erroneous in point of law, contrary to the great weight of the evidence, and the product of judicial bias and prejudice. An appeal was therefore taken the next day and within a week all these complaints were reiterated to opposing counsel and were laid before the Court of Appeals in connection with the application for supersedeas. A record presenting all these errors was duly prepared and filed, and all the questions were fully briefed and argued by both sides.

On May 1, 1956, the Court of Appeals reversed the judgment and ordered a new trial before a different judge (232 F2d 458). Judicial bias and prejudice was the ground on which the decision was rested. The effect of this opinion was to allow defendants (appellants in the Court of Appeals, respondents here) to tax as costs their supersedeas bond premium, their cost of printing their appendix, and the clerk's docket fee, amounting to $11,256.70. This was

in accordance with settled practice and the Sixth Circuit Rule 23(3).

The plaintiffs (appellees in the Court of Appeals, petitioners here) acquiesced in the reversal of the judgment but by petition for rehearing they sought to have the Court of Appeals exercise its descretion and withhold the taxation of costs. This the Court of Appeals declined to do its ruling being embodied in a supplemental opinion handed down July 19, 1956, and not yet printed in the Federal Reporter.

The present petition for certiorari offers no defense for the original judgment and does not question the correctness of the decision reversing it. The sole review sought is as to the discretionary ruling on costs.

Argument

Heretofore this Court has consistently declined to review cases which present no question except that of the discretionary award of costs:

> *Newton v. Consolidated Gas Co.*, 265 U.S. 78 at 83; 68 L. Ed. 909:
>
> "The rule forbidding appeals from decrees for costs only is easily deducible from the discretion vested in the trial court in fixing them, and the better opportunity of that court to exercise that discretion from its greater intimacy with details of the pleadings, hearings, and orders in the case. When the power of the court to assess costs against either party is not in dispute, or the mere amount to be fixed is in issue, appeals on such questions alone are not allowed."
>
> *Paper Bag Machine Cases*, 105 U.S. 766, 26 L. Ed. 959;
>
> *DuBois v. Kirk*, 158 U.S. 58, 39 L. Ed. 895;
>
> *Glendale Electric Fabrics Co. v. Smith*, 100 U.S. 110, 25 L. Ed. 547.

The present petition for certiorari seems to suggest only three theories as to why the Court of Appeals might have exercised its discretion differently—that the question of judicial bias and prejudice could have been presented to the court at an earlier date on a smaller record; that there ought to be a special rule about costs in a stockholders' derivative action; and that the errors for which the case was reversed were more the fault of the trial judge than of the petitioners. Our answer to these claims is as follows:

1. The District Judge's attitude, which the record has obliged the Court of Appeals to call bias and prejudice, was not known—that is, not known to us—until after the trial began, and it was demonstrated by a series of rulings and of acts occurring throughout the trial. Appeal after the trial was therefore the correct remedy. As the Court of Appeals has held (*Knapp v. Kinsey*, F2d ; opinion of July 19, 1956, not yet reported, p. 2):

> "Under the circumstances the remedy cannot be by a change of judges during the trial; it necessarily becomes a matter of alleged prejudicial error and for correction by the Court of Appeals. *Moskun v. United States*, 143 F2d 129, C. A. 6th; *United States v. Flegenheimer*, 14 F. Supp. 584, 591; D.C. N.J. We do not agree with appellees' contention that the issue was not timely raised and preserved by appellants during the trial in the District Court."

This is sustained by the following decisions in addition to what the Court cites:

Ex parte American Steel Barrel Co., 230 U.S. 35, 57 L. Ed. 1379;

Eisler v. United States (C.A. D.C. 1948), 170 F2d 273;

Hurd v. Letts (C.A. D.C.), 152 F2d 121 (relied on by petitioners);

Refior v. Lansing Drop Forge Co. (C.A. 6, 1942), 124 F2d 440;

Minnesota and Ontario Paper Co. v. Molyneaux (CCA 8, 1934), 70 F2d 545;

Shea v. United States (CCA 6, 1918), 251 Fed. 433.

And the court below expressly finds, on the same page of the same opinion, that our printed appendix was not unreasonably large:

> "Nor do we find any fault on the part of appellants in preparing and presenting an appendix of approximately 4400 pages which presented the issues on the merits as well as the issue of the judgment being invalid because of alleged bias and prejudice. Although the case was not decided on its merits and the major portion of the appendix was not needed by the Court, it would have been needed if it had become necessary to consider the case on the merits. It is to be noted that appellees filed their own separate appendix of approximately 2700 pages which likewise presented the issues on the merits."

2. In a stockholders' derivative action the unsuccessful plaintiffs are usually liable for the costs just as in any other case:

Edwards v. Bay State Gas Co. (D. Del. 1904), 130 Fed. 242;

Kennedy v. Emerald Coal & Coke Co. (1943), 27 Del. Ch. 55, 30 A2d 269;

Holland v. Presley (1939), 14 N.Y.S. 2d 83.

The present case is only in part and superficially a derivative action, as has been shown above. Finally, the point is raised for the first time in this Court.

3. Petitioners' conduct during the trial and on appeal makes it highly equitable that they should reimburse us for our taxable appeal costs. It is of course true that they

did not appoint the District Judge to the bench, but in large part the erroneous behavior of the trial judge was advised by, or enthusiastically adopted by, the petitioners. They prolonged the proceedings by continually calling, excusing, and recalling witnesses, and leading the trial court into digressive colloquies. They introduced into the case the campaign against the Securities and Exchange Commission described in 226 F2d 501, and by their own admission they thereby prolonged the trial at least six weeks (3180a-3181a). They endorsed the exclusion from the trial of the defendant corporation's attorney of record (2157a). They advised the trial judge against the entry of orders which might be appealable (3656a, 3934a). As to the threats and attempts at intimidation of parties and witnesses which are so prominently mentioned by the Court of Appeals, petitioners originated some and approved others (2636a, 3136a, 3156a, 3366a, 3382a, 3435a, 3436a). Their attorney sat with the judge in private conference for the drafting of papers (3363a-3364a). When judgment was entered and respondents applied for supersedeas, petitioners' counsel opposed the application and demanded that any supersedeas bond be fixed at not less than $350,000. On petitioners' representation that they could sustain the judgment, respondents were required to post a very substantial bond, the cost of which petitioners now object to paying. In all of their appearances before the Court of Appeals, petitioners defended the trial judge's conduct and asked that his judgment be affirmed. Failing in that they now ask to be excused from paying respondents' costs necessarily incurred in bringing about reversal. The Court of Appeals gave this question careful study. It had already decided two appeals in the matter, both with large printed records in addition to the original papers. Voluminous briefs had been furnished, and twice there had

been lengthy oral arguments. Against this background the appellate court exercised its discretion against petitioners, saying (*Knapp v. Kinsey*, ... F2d ; Opinion of July 19, 1956, p. 3):

> "We do not find in this case sufficient reason for departing from the usual rule of awarding costs in full to the prevailing party."

These taxable costs ought to be paid. The petition for certiorari does not present any meritorious question.

Dated: Detroit, Michigan,
September 25, 1956.

Respectfully submitted,

RICHARD FORD,
Attorney for Respondents
Knapp et al, Voting Trustees,
1100 Dime Building,
Detroit 26, Michigan.

ARTHUR W. SEMPLINER,
Attorney for Respondents
Knapp et al, Individually,
2005 Dime Building,
Detroit 26, Michigan.

CHARLES H. KING,
Attorney for Respondent Huber,
130 East Elizabeth,
Detroit 1, Michigan.

KENNETH B. McCONNELL,
FISCHER, SPRAGUE, FRANKLIN & FORD,
Of Counsel,
1100 Dime Building,
Detroit 26, Michigan.

Office - Supreme Court
FILED
OCT 11 195
JOHN T. FEY, C

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER 1956 TERM

No. 376

JOHN P. KINSEY et al,
Petitioners,
v.
BURTON S. KNAPP et al,
Respondents.

PETITIONERS' SUPPLEMENTAL AND REPLY BRIEF

GEORGE E. BRAND,
Attorney for Petitioners.
GEORGE E. BRAND, Jr.,
Of Counsel.

MOERS, INC., 905 HENRY ST., DETROIT, MICH.

TABLE OF CASES CITED

	Page
Eisler v. United States (CA D.C.), 170 F 2d 273	3
Ex parte American Steel Barrel Co., 230 US 35, 57 L ed 1379	2
Hibdon v. United States (CA 6, June 2, 1956), 235 F 2d 49	1, 3
Hurd v. Letts (CA D.C.), 152 F 2d 121	3
Knapp et al v. Kinsey et al, 235 F 2d 129	1
Minnesota and Ontario Paper Co. v. Molyneaux (CCA 8), 70 F 2d 545	3
Moskun v. United States (CA 6), 143 F 2d 129	2
Refior v. Lansing Drop Forge Co. (CA 6), 124 F 2d 440	3
Shea v. United States (CCA 6), 251 Fed. 433	4
United States v. Flegenheimer (DC N.J.), 14 F Supp 584	2

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER 1956 TERM

No. 376

JOHN P. KINSEY et al.,
Petitioners,
v.
BURTON S. KNAPP et al.,
Respondents.

PETITIONERS' SUPPLEMENTAL AND REPLY BRIEF

Knapp et al v. Kinsey et al (petition page 1) is now reported in 235 F 2d 129.

Not only does the decision of the Court of Appeals that the disqualification statute (28 USC § 144) is inapplicable conflict with decisions of other federal courts as pointed out in the petition, but apparently it conflicts with the very recent decision by the same court in *Hibdon v. United States* (CA 6, June 2, 1956), 235 F 2d 49. In affirming a criminal sentence despite a charge of bias and prejudice of the trial judge the Court there said:

> "There was no petition or affidavit of disqualification presented either before *or during* the trial." (italics added)

Surely it would be no reason to refuse reversal for failure to file such a petition or affidavit during the trial if such filing was not required in order properly to raise the question.

Respondents contend that there was no manifestation of prejudice until after the trial began and that therefore no affidavit of prejudice was required and the matter of disqualification was reviewable on appeal from the resultant judgment. Petitioners contend that proper procedure requires the making of a formal charge of disqualification when the prejudice appears and that such charge is a requirement precedent to recusation, voluntarily made or compellable, and to review on appeal from a judgment entered by the judge whose right to try the case was thus challenged.

The following cases, cited by the Court of Appeals, do not support its view that the statute did not require respondents to file an affidavit of prejudice in the instant action:

Moskun v. United States (CA 6), 143 F 2d 129. The flare-up by the district judge was during rehearing on a naturalization petition and was simultaneous with the denial of the petition.

In *United States v. Flegenheimer* (DC N.J.), 14 F Supp 584, an affidavit of prejudice was filed and considered to be inadequate.

The same is true of the following additional cases which respondents tender in their brief, pages 5-6.

Ex parte American Steel Barrel Co., 230 US 35, 57 L ed 1379, in which the district judge stepped aside upon the

filing of an affidavit that he was prejudiced. This Court refused mandamus to review the designation of another judge by the Circuit Judge.

Eisler v. United States (CA D.C.), 170 F 2d 273, in which an affidavit of prejudice was filed, and its sufficiency and timeliness were passed upon by the trial judge whose ruling thereon was affirmed upon appeal from the appellant's conviction.

Hurd v. Letts (CA D.C.), 152 F 2d 121, in which an affidavit of prejudice, filed when the trial was near conclusion, was passed upon by the trial judge and found to be insufficient. The appellate court denied prohibition, reserving the question for determination if raised on an appeal from any judgment resulting from the trial. In effect the court held that the disqualification statute applied even when the claimed prejudice was first manifested during the trial, because it ruled that the filing of an affidavit of prejudice under the statute was not restricted to filing before trial—which appears to be the right view.

Refior v. Lansing Drop Forge Co. (CA 6), 124 F 2d 440, expressly recognized that the statute permits the filing of an affidavit of prejudice after trial has begun, if failure to file it earlier is excusable. There such an affidavit was filed, its sufficiency was ruled upon by the trial judge and his ruling against disqualification was affirmed on appeal. This decision squares with petitioners' contentions herein and with the recent decision of the same court, *Hibdon v. United States*, page 1, ante.

Minnesota and Ontario Paper Co. v. Molyneaux (CCA 8), 70 F 2d 545, in which an affidavit of prejudice was filed without any showing of good cause for filing it within less than 10 days before the beginning of the term, as prescribed by the statute. The trial judge held the affidavit was un-

timely filed and otherwise insufficient as to the statement of facts. The court affirmed on these grounds and also because no special circumstances existed justifying the writ.

Shea v. United States (CCA 6), 251 Fed. 433, in which the Court of Appeals had ordered a retrial of a criminal case but the mandate was not filed in the trial court until after the first day of term. Jurors for the retrial had been summoned and 2 days before the date set for trial an affidavit of prejudice was tendered for filing. The judge rejected it as not timely tendered and, on appeal from the defendant's conviction, the Court of Appeals affirmed saying:

> "* * * Assuming, however, * * * that it could not have been filed before the mandate went down, it clearly could and should have been filed at the nearest available time thereafter. * * *"

Thus the Court recognized the right and duty to file an affidavit of prejudice at any time if the delay in filing is excusable.

The Court of Appeals in the instant case committed a fundamental error in holding that no affidavit of prejudice need be filed if the prejudice is manifested after the trial has commenced and that error led the Court to conclude that it had the right, as a matter of discretion, to impose upon petitioners liability for the entire costs of the appeal. Petitioners' reply is that no such power exists, but if it does the Court's determination was, under the circumstances, inequitable and an abuse of judicial discretion. Under such circumstances petitioners contend that the misinterpretation of the statute and the wrongful allowance of costs should be corrected.

We offer no apology for not imposing upon this Court consideration of a petition for certiorari on the main decision ordering a new trial. The basis of that decision is that the proceeding was no trial because of bias and prejudice of the presiding officer. It is that fact, thus established, upon which petitioners base their contention that under the circumstances they should not be made to pay respondents' costs on the appeal.

Respondents' contentions that the allowance of costs was justified because of the conduct of petitioners' counsel seem to be answered by the fact, determined by the Court of Appeals, that petitioners' counsel were not responsible for the conduct of the trial judge.

Respectfully submitted,

GEORGE E. BRAND,
Attorney for Petitioners.

GEORGE E. BRAND, Jr.,
Of Counsel.

October 9, 1956.